See also Vol. 3184

Nos. 15,959 and 15,960

United States Court of Appeals

For the Ninth Circuit

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BRIEF FOR APPELLANTS.

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Subject Index

Table of Authorities Cited

Statutes

Texts

Miscellaneous

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BRIEF FOR APPELLANTS.

JURISDICTIONAL STATEMENT.

These are appeals from judgments of the District Court entered on January 16, 1958, denying the relief sought by appellants and dismissing their actions (T., Cheng Transcript 24; T., Lin Transcript 23-24). In the case of the appellant, Cheng Fu Sheng (No.

15959), who had been taken into custody by the Immigration and Naturalization Service prior to the commencement of this action, there was filed in the District Court on April 29, 1957, a petition for a writ of habeas corpus. (T., Cheng 4.) Said petition sought review of the final administrative order denying Cheng's application for adjustment of status to that of an alien lawfully admitted for permanent residence pursuant to Section 6 of the Refugee Relief Act of 1953, as amended. Jurisdiction of the District Court to entertain the petition for writ of habeas corpus is conferred by 28 U.S.C. 2241 et seq. Jurisdiction is also conferred upon the District Court by Section 10 (a)(b) of the Administrative Procedure Act (5. U.S.C. 1009 (a)(b)).

In the case of the appellant, Lin Fu Mei (No. 15960), an action for declaratory judgment was filed in the District Court on April 30, 1957. (T., Lin 5.) Like Cheng, Lin sought review of the final administrative order denying his application for adjustment of status to that of an alien lawfully admitted for permanent residence pursuant to Section 6 of the Refugee Relief Act of 1953, as amended. The jurisdiction of the District Court was invoked under the Declaratory Judgment Act (28 U.S.C. 2201) and under Section 10 of the Administrative Procedure Act (5 U.S.C. 1009).

Jurisdiction of the Court of Appeals to review the judgment of the District Court in the case of the appellant, Cheng Fu Sheng, is conferred by 28 U.S.C. 2253. Jurisdiction of the Court of Appeals to review

the judgment of the District Court in the case of appellant, Lin Fu Mei, is conferred by 28 U.S.C. 1291.

STATUTE INVOLVED.

Section 6 of the Refugee Relief Act of 1953, as amended (67 Stat. 403 (1953), as amended, 50 U.S.C.A. Appendix 1971(d)) provides as follows:

> "Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion, or who was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United States on the date of the enactment of this Act and is otherwise qualified under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported or prior to the end of the session of the Congress next following the session in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves

the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized, upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscellaneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. If, within the above specified time, the Congress does not pass such a concurrent resolution, or, if either the Senate or the House of Representatives passes a resolution stating in substance that it does not approve the granting of the status of an alien lawfully admitted for permanent residence, the Attorney General shall thereupon deport such alien in the manner provided by law: *Provided,* That the provisions of this section shall not be applicable to any aliens admitted to the United States under the provisions of Public Law 584, Seventy-ninth Congress, second session (60 Stat. 754), Public Law 402, Eightieth Congress, second session (62 Stat. 6); *Provided Further,* That the number of aliens who shall be granted the status of aliens lawfully admitted for permanent residence pursuant to this section shall not exceed five thousand."[1]

BACKGROUND OF THE REFUGEE RELIEF ACT OF 1953.

The legislative history of the Act[2] evidences Congress' concern with the political, social and economic

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[1]Prior to amendment, relief was limited to the alien who could establish that "persecution or fear of persecution" resulted from events which occurred subsequent to his entry into the United States.

[2]50 U.S.C.A. Appendix 1971-1971q.

problems created by the many thousands of persons left homeless as a result of the emergence of new totalitarian states after World War II. The Act was designed, in part, to alleviate over population pressures abroad and to thereby further the objectives of American foreign policy. Primarily, however, the Act had the humanitarian purpose of providing a permanent home to those unfortunate individuals who, either abroad or in the United States, had nowhere to turn but toward a dictatorship. Congress' desire to afford relief to the victims and potential victims of the oppression of totalitarianism is expressed throughout the Report of the House Judiciary Committee on House Bill 6481.[3]

The Act provides for the issuance of immigration visas to refugee aliens outside the United States as well as making it possible for certain aliens within the United States to adjust their status to that of a lawful permanent resident. The alien abroad who applies must fit within certain categories defined by the Act. The matter of determining whether an application for a visa under the Act shall be granted to a refugee alien outside the United States is left entirely to the administrative agencies of the Federal Government. On the other hand, aliens within the United States who apply for adjustment of status under Section 6 of the Act, need not fit within the categories set up under the other provisions of the Act. If they meet the requirements of Section 6, the Attorney Gen-

[3]House Report 974, U.S. Code Cong. Adm. News, 83rd Congress, 1st Session, Vol. II, page 2103 et seq.

eral, acting through his designated representatives, must report to Congress all the pertinent facts in the case. Determination of eligibility is the sole function conferred upon the Attorney General by Section 6. Congress has reserved to itself the function of determining whether the application shall be granted as a matter of discretion.

Cheng Fu Sheng v. Barber, 144 F. Supp. 913 (D.C. Cal. 1956);

Chien Fan Chu v. Brownell, 247 F. 2d 790, 793, 101 U.S. App. D.C. 204 (1957).

In this respect, Section 6 is clearly distinguishable from other immigration statutes granting discretionary relief such as Section 243 (h) of the Immigration and Nationality Act of 1952. (8 U.S.C. 1253 (h).)[4] Speaking of the contrast between the two provisions, the Court in *D'Antonio v. Shaughnessy,* 139 F. Supp. 719 (D.C. N.Y. 1956), stated at pages 722 and 723 as follows:

> "While both deal with the problem of a deportee facing deportation to a country wherein he may be persecuted, under Section 1253(h) the immigrant must show fear of *'physical persecution'* (emphasis supplied by court), and even then the action on the part of the Attorney General in staying deportation is apparently at his *discretion* (emphasis supplied by writer). On the other hand, under Section 1971(d), enacted subsequent to Section 1253(h), it is sufficient that the alien

[4] "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which *in his opinion* the alien would be subject to physical persecution and for such period of time as *he deems to be necessary* for such reason." (Emphasis supplied.)

show 'persecution or fear of persecution on account of race, religion, or political opinion,' and it is apparently *mandatory* (emphasis supplied by writer) upon the Attorney General that he submit the matter to Congress for further action if he finds facts supporting the existence of the statutory condition."

Section 6 has uniformly been construed liberally in order to effectuate its remedial purpose.

Shio Han Sun v. Barber, 144 F. Supp. 850 (D.C. Cal. 1956);

D'Antonio v. Shaughnessy, supra;

Chien Fan Chu v. Brownell, supra.

STATEMENT OF THE CASE.

Appellants are natives and citizens of China. Both enlisted in the Chinese Nationalist Air Force and served in China until the overthrow of the Republic of China by Communist forces. Thereafter, they were transferred with their military units to Formosa. The appellants entered the United States as officers of the Chinese Nationalist Air Force for the purpose of receiving military training here. Both left their military units and have since remained in the United States because of their political convictions.[5]

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[5]"On November 3, 1952, he (Cheng) voluntarily presented himself to the Immigration and Naturalization Service and explained that he had deserted his airforce unit and remained in the United States because he considered the Chinese Nationalist Government to be a corrupt dictatorship to which he could no longer give his allegiance.

. . . .

He (Lin) was subsequently arrested in deportation proceedings and testified in such proceedings that he had deserted his airforce

The appellant, Cheng Fu Sheng, filed his application for adjustment of status under Section 6 of the Act on November 3, 1953. A hearing was held by an examining officer of the Immigration and Naturalization Service in order to determine whether the appellant was eligible for the benefits of Section 6.[6] In a decision dated September 12, 1955, the examining officer recommended denial of the application on the grounds that:

1. Appellant had committed a crime involving moral turpitude, to wit, desertion, and was therefore inadmissible to the United States under the Immigration and Nationality Act, and

2. Appellant's country of last residence was Formosa and he was not unable because of fear of persecution on account of race, religion, or political opinion to return to that country.

On Appeal to the Regional Commissioner of the Immigration and Naturalization Service, the recommended decision of the examining officer was disapproved. The Regional Commissioner ruled that Cheng had been present in Formosa solely because of military orders and it, therefore, followed that the country of his last residence was China. The Regional Commissioner also concluded that desertion was not a crime involving moral turpitude, and that Cheng was not inadmissible to the United States by reason

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unit and remained in the United States because he considered the Chinese Nationalist Government to be totalitarian in character and a police state." *(Cheng Fu Sheng v. Barber,* supra, at page 914.)

[6] 8 C.F.R. 245 (a).

of having committed such a crime. However, the Regional Commissioner in his decision of October 4, 1955, did rule that Cheng was ineligible for the benefits of Section 6 on the ground that he was not a person of good moral character in view of his desertion. Subsequently, on October 11, 1955, a Motion to Reopen proceedings was filed on behalf of Cheng to afford him the opportunity to establish good moral character. Said motion was granted on October 19, 1955, and the case was remanded to the District Director for further hearing.

Additional evidence was received in a reopened hearing and on December 9, 1955, the examining officer of the Immigration and Naturalization Service again recommended denial of Cheng's application. On this occasion, denial was recommended for the reason that Cheng is of a class of aliens which Congress did not intend to come within the purview of the Act. On appeal to the Regional Commissioner, it was ordered that Cheng's application be denied in accordance with the recommendation of the examining officer. Thereafter, on July 12, 1956, a complaint was filed in the United States District Court for declaratory judgment seeking review of the final order of the Regional Commissioner. In a consolidated opinion[7] under date of September 28, 1956, the Honorable Louis E. Goodman granted motions for summary judgment and remanded to the Immigration and Naturalization

[7] *Cheng Fu Sheng v. Barber,* supra.

Service for further proceedings in both the case of Cheng Fu Sheng and the case of Lin Fu Mei.[8]

After conducting further hearings in both cases, the examining officer of the Service again recommended that the applications be denied in decisions dated March 18, 1957. In both cases the ground for denial was that appellant's country of last residence is Formosa and that he can return there without fear of persecution on account of his political opinion. The recommended decisions of the examining officer in both cases were approved by the Regional Commissioner under date of April 19, 1957. (T., Cheng 13; T., Lin 13.)

Cheng was taken into custody by the Immigration and Naturalization Service on April 26, 1957, and his petition for a writ of habeas corpus was filed in the District Court on April 29, 1957. Lin filed his complaint for a declaratory judgment in the District Court on April 30, 1957. In both actions, appellants sought review of the final orders of the Regional Commissioner entered on April 19, 1957. The District Court denied the relief sought by appellants and dismissed their actions. (T., Cheng 24; T., Lin 23-24.)

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[8]Appellant Lin Fu Mei filed his application under Section 6 on December 23, 1954. His application was denied by the Regional Commissioner on February 1, 1955, in accordance with the recommendation of the examining officer who found that Lin, like Cheng, was of a class of aliens which Congress did not intend to come within the purview of the Refugee Relief Act. An action for declaratory judgment was filed in the District Court on July 17, 1956, in Lin's case.

SPECIFICATION OF ERRORS.

Appellants have specified the following points on which they intend to rely on this appeal:

1. The Court erred in finding that the appellants' place of last residence is Taiwan (Formosa).

2. The Court erred in finding that appellants are able to return to Taiwan (Formosa) without persecution or fear of persecution on account of race, religion or political opinion.

3. The Court erred in concluding that the appellants become ineligible for the benefits of Section 6 of the Refugee Relief Act upon termination of their status as bona fide non-immigrants in the United States. (T., Cheng 26-27; T., Lin 25-26.)

ARGUMENT.

I. RESIDENCE.

Eligibility for relief under Section 6 of the Act depends, in part, upon a determination of the country in which the applicant last resided prior to his admission into the United States. The applicant must establish that ". . . he is unable to return to the country of his . . . last residence because of persecution or fear of persecution. . . ." Throughout the course of administrative proceedings and in the Court below appellants have contended that their country of "last residence", within the meaning of Section 6, is China, not Taiwan (Formosa). It is submitted that the appellees erroneously construed Section 6 in finding that appellants'

country of last residence is Taiwan. The final administrative decisions state, in pertinent part, as follows:

> "It is believed that members of the Armed Forces of China should be placed in the same category as other Government Officials holding official positions in Formosa (Taiwan). As the Chinese Nationalist Government has possession of Formosa and is there indefinitely it is believed that the residence is in Formosa." (T., Cheng 12; T., Lin 12.)

The above language indicates that the finding of the appellees is based upon a concept of "residence" which has no place within the context of Section 6. Appellees evidently had in mind the term, "official residence", denoting the residence of a government official for jurisdictional purposes, service of process, and other official acts. It may be that the appellants had an "official residence" in Formosa in view of the fact that they were members of the Armed Forces of the Chinese Nationalist Government and that government was located on Formosa. It does not follow, however, that appellants' country of "last residence", within the meaning of Section 6, was Formosa.

Obviously, "official residence" is not the equivalent of "residence", as used in Section 6 of the Act. In enacting the latter provision, Congress intended that "residence" have a much broader meaning than the term "official residence" is accorded. Generally, the interpretation of the word "residence" depends upon the context in which it is used.

> "It is axiomatic that residence is not a term of fixed legal definition but takes on shades of mean-

ing according to the statutory framework in which it is found."

Kristensen v. McGrath, 179 F. 2d 796, 801, affirmed, 340 U.S. 162.

Although the Refugee Relief Act of 1953, as amended, contains no definition of "residence", Section 15 of the Act[9] provides as follows:

"Except as otherwise expressly provided by this Act, all of the provisions of the Immigration and Nationality Act shall be applicable under this Act."

Section 101 (a)(33) of the Immigration and Nationality Act[10] reads:

"The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent."

As defined above, "residence" cannot be equated with physical presence, nor with domicile. It lies in the area somewhere in between these two concepts. In considering a somewhat comparable provision, "resident within", the Supreme Court held that the term, "implies something more than mere physical presence and something less than domicile. . . ." *Guessefeldt v. McGrath,* 342 U.S. 308, 312 (1952).

No definition of residence fails to take into account the individual whose physical presence in a particular country is the result of compulsion and not a matter

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[9]50 U.S.C.A. Appendix, 1971 (m).

[10]8 U.S.C.A. 1101 (a)(33).

of choice. Courts have always attached considerable significance to physical presence resulting from compulsion. A case in point is *In re Yarina,* 73 F. Supp. 688 (D.C. Ohio 1947), involving the interpretation of a naturalization statute. After acknowledging that naturalization statutes must be strictly construed, the Court nevertheless went to the extent of holding that the petitioner had not been absent from the United States for a continuous period of one year or more within the meaning of the statute. The petitioner's absence in this case was occasioned by his capture and subsequent incarceration in a Japanese prison camp for more than one year during the period in question.

Volition as a factor of primary importance in determining residence has been recognized under a variety of statutes. One of the leading cases is *Neuberger v. United States,* 13 F. 2d 541 (C.C.A. 2, 1926), holding that a petitioner for naturalization fulfilled the requirement of residence in the United States for a continuous period of five years previous to his application where, during a substantial part of the period in question, he had been detained in Germany and forced to serve in the German Army. After discussing the distinction between residence and domicile, Judge Learned Hand stated at page 542, as follows:

> "But there is substantial unanimity that, however construed in a statute, residence involves some choice, again like domicile, and that presence elsewhere through constraint has no effect upon it."

The Court of Appeals, in *Kristensen v. McGrath,* supra, dealt with residence in the United States pur-

suant to the Selective Training and Service Act of 1940, insofar as this matter affected the alien's eligibility for suspension of deportation. Holding that the alien lacked the necessary volition to reside within the United States, the Court stated at pages 801-802, as follows:

> "But wherever used, the term has an irreducible minimum of meaning. As we shall indicate, it requires at least an abode which is in some degree permanent and is the result of choice.
>
> . . . .
>
> Presence in a foreign land because of war, and the attendant inability to return to one's own country, does not possess the volitional element which is basic to residence."

In affirming the decision of the Court of Appeals in the above case, the Supreme Court stated:

> "When we consider that Section 3(a) was obviously intended to require military service from all who sought the advantages of our life and the protection of our flag, we cannot conclude, without regulations so defining residence, that a sojourn within our borders *made necessary by the conditions of the times* was residence within the meaning of the statute." (Emphasis supplied.)
>
> *McGrath v. Kristensen,* 340 U.S. 162, 175-176 (1950).

Construing the term, "resident within", as found in the Trading with The Enemy Act, the Supreme Court ruled that an alien who was involuntarily detained in Germany from 1938 until July of 1949 was not a

"resident within" Germany since his physical presence was under physical constraint.

Guessefeldt v. McGrath, 342 U.S. 308 (1952).

The principle enunciated in the above cases undoubtedly applies to members of the Armed Forces of any nation, and this is especially so if that nation is at war. Even during peace time, when it is expected that a serviceman may have some choice as to where he is stationed, our courts have held that his presence in a particular place pursuant to military orders does not change the residence which he had at the time he entered the service.

Kinsel v. Pickens (1938), 25 F. Supp. 455;
Wise v. Bolster (1939), 31 F. Supp. 856.

Indeed, the Regional Commissioner, in his original decision of October 4, 1955, relating to appellant Cheng, conceded that volition is a primary factor in determining "last residence" within the meaning of Section 6. Said decision states, in pertinent part, as follows:

> "The applicant, through counsel, has filed exceptions to the proposed recommendation contending first that China and not Formosa is the place of the applicant's last residence. The record establishes that during the applicant's stay on the island of Formosa he was an officer in the Chinese Nationalist Air Force and that his presence was the result of military orders. The applicant has stated that he considered his home to be the mainland of China. It is concluded that the applicant's last place of residence is China, and the

first ground of denial recommended by the Immigration Officer is therefore not approved.[11]

The issue of what is meant by "last residence", as that term appears in Section 6 of the Act, was squarely presented in *Chien Fan Chu v. Brownell,* supra. Appellants, husband and wife, had resided in China until their arrival in Formosa on November 28, 1948. Their departure to Formosa was occasioned by the imminent threat of an invasion of their homeland by Communist Forces. They lived in Formosa until August of 1949, when the husband departed for the United States and the wife left for Hong Kong. During their stay in Formosa, appellants were making arrangements for the husband's eventual departure to the United States. Their applications for adjustment of status under Section 6 of the Act were denied by the Regional Commissioner on the ground that because they could have remained in Formosa, that country will be considered their country of last residence. The Court held that the Regional Commissioner had erroneously construed "last residence" and that appellants' "last residence" as a matter of law was China, and not Formosa. The basis of the Court's decision was the temporary nature of the appellants' stay in Formosa and the fact that their presence in that country was made necessary by the conditions of the times. At page 795, the Court states:

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[11]This decision has never been expressly overruled by appellees. While it is recognized that the doctrine of res judicata is not strictly applicable to administrative tribunals, uniformity of administrative decisions is nevertheless desirable.

> "Formosa looms large as, but only as, a temporary place of asylum pending completion of the formalities requisite for entry into the United States."

Thus, the Court recognized the importance of the element of volition in determining country of "last residence" within the meaning of Section 6 of the Act.

In *Chien Fan Chu,* it was also pointed out that Congress had used "foreign residence" in Section 7(d) of the Act advisedly with the intention of distinguishing between this term and "last residence" found within Section 6 of the Act. The concept of "official residence", applied to appellants herein as the criterion for determination of their country of "last residence", is no more warranted by the statute than is the concept of "foreign residence". If such erroneous concepts are rejected and the proper test is applied, we believe that the undisputed facts contained in the administrative record establish as a matter of law that the appellants' country of last residence is China. The salient facts are parallel in all important respects with those in the cases cited above which deal with physical presence resulting from compulsion. Unquestionably, the sole reason for appellants' physical presence in Formosa was that they were ordered to go there by their military superiors. They had absolutely no contact with Formosa prior to their assignment there. China is their birthplace and they had always lived there until the Chinese Communists forced them to evacuate to Formosa. Appellants lived in military barracks while stationed on Formosa. They

have never acquired property of any kind in Formosa which would tend to identify them with that country. Appellant Cheng has a wife and child who are now in Formosa. His wife fled from Nanking, China, her birthplace, just prior to the arrival of the Communist forces, taking two suitcases to Formosa with her. She has made application as a refugee for the issuance to her of an immigration visa at the office of the American Consul at Taipeh, Formosa. Appellant Lin has no relatives in Formosa.

The facts relating to country of "last residence" in these cases are uncontroverted. Therefore, the problem of determining truth or falsity of evidence is not presented herein. Nor is there any problem of weighing one fact against another to determine whether substantial evidence exists to support the administrative finding. The only question presented, insofar as the issue of "last residence" is concerned, is a question of law. We submit that the appellees have erroneously construed "last residence", as that term is employed within Section 6 of the Act. We further submit that under the proper interpretation of "last residence" the undisputed facts contained in the administrative record require a finding as a matter of law that appellants' country of "last residence" is China.

II. PERSECUTION OR FEAR OF PERSECUTION.

Section 6 of the Act requires an applicant to establish that:

> ". . . he is unable to return to the country of his birth, or nationality, or last residence because of

> *persecution or fear of persecution* on account of race, religion, or political opinion. . . ." (Emphasis supplied.)

Appellants have contended at all stages of these proceedings that they are unable to return to both China and Formosa because of *persecution or fear of persecution* on account of their political opinion. It is unnecessary to discuss the factor of persecution with reference to China, inasmuch as appellees have never denied that appellants would be subject to persecution if returned to China. In the event this Court should decide that Formosa is appellants' country of "last residence," within the meaning of Section 6, the subject of persecution with reference to Formosa would be an issue since appellants' eligibility for relief would then depend upon their establishing that they have a rational basis for fearing persecution upon their return to Formosa. In the following discussion it will be assumed for the purpose of argument that Formosa is appellants' country of "last residence."

The appellees' finding that appellants are able to return to Formosa without fear of persecution is based entirely on a letter dated January 8, 1957, from the Chinese Consul General of San Francisco. The final administrative decision states:

> "Under date of January 8, 1957 the Chinese Consul General in San Francisco officially advised this Service that his Government had directed him to declare that according to their law this applicant is subject to prosecution for desertion upon his return to Taiwan. He will face a trial in an or-

> derly, judicial process, in which there will be a formal indictment and the defendant is permitted to be defended by lawyers, including the right to cross-examine witnesses against him. If convicted he will be subject to punishment according to Article 93 of the Criminal Code governing the personnel of the Army, Navy, and Air Force of the Republic of China, the maximum sentence being imprisonment for not more than 3 years. The allegation that he will be subject to persecution or death sentence is entirely groundless." (T., Cheng 11-12; T., Lin 11-12.)

A letter, identical in kind to the one referred to above, was characterized as entirely lacking in evidentiary value in the case of *Sang Ryup Park v. Barber,* 107 F. Supp. 605 (D.C. Cal. 1952), where at page 607, the Court said:

> "Nor should a statement, solicited by the delegate of the Attorney General from the diplomatic representative of such nation, that the alien would not be persecuted there, suffice. *No other reply* (emphasis supplied by Court) could reasonably be expected. By it, the Attorney General did not receive any more evidence or information about conditions in Korea than he had theretofore. Such a statement obviously could be obtained for the asking in every case in which the Attorney General is required to make a finding. It is not the sort of evidence, upon which a solemn finding, involving human life, should depend."

Yet, other than the letter from the Chinese Consul General, the record is devoid of any evidence that even tends to support the conclusion that appellants

can return to Formosa without fear of persecution on account of their political opinions. Appellants, on the other hand, have submitted overwhelming evidence, consisting of both testimony and documents, which substantiates their claim of persecution or fear of persecution. Perhaps the most important evidence in the administrative record relating to persecution in Formosa is the sworn statement of Dr. K. C. Wu, who testified at the Chicago office of the Immigration and Naturalization Service on August 16, 1954. Dr. Wu served as Governor of Formosa from December 21, 1949, until April 16, 1953, at which time he resigned. He is probably the only individual today who has sufficient knowledge and courage to reveal the inside operation of the Chinese Nationalist Government. At page 5 of Dr. Wu's statement, he describes how "Democratic Centralization" works in the Kuomintang and how it results in absolute power being vested in Chiang Kai Shek. Democratic Centralization is, of course, the same political theory that the Governments of Communist China and Communist Russia have utilized. These Governments, like the Formosan Government, have all the trappings of a democracy. Theoretically, the constitution is the supreme law of the land. Supposedly free elections are held, and nominally, ultimate control is vested in the people. Actually, however, all of these institutions are a facade behind which reposes one individual who wields complete control.

Dr. Wu's sworn statement and his magazine article,[12] which was also entered into the administra-

[12] "Your Money has Built a Police State in Formosa", Look Magazine, June 29, 1954.

tive record, describe the gradual ascendancy of the Secret Police in Formosa. Under the leadership of Chiang Ching Kuo, Chiang Kai Shek's son and the heir apparent to his throne, the Secret Police have assumed increasingly more functions until it can now be said that that organization dominates all governmental departments in the Formosa Government. Dr. Wu, at page 11 of his sworn statement, states that:

> "The Secret Police was not under my control directly, but because of my prestige, I should say and because of my position over there, I did quite a bit where ever I could. I met with quite a lot of opposition. I fought a battle and gradually it was a losing battle in the end, but I did it. I think now my successors are what I call the typical yes men, so I think they will not dare to do anything about the secret police now."

When asked to characterize the present government of Formosa, Dr. Wu at page 14 of his sworn statement said that it is, "A dictatorship and police state, just a plain dictatorship and a plain police state. The people like me who knows the inside knows the truth." Dr. Wu also told of the mass arrest of 398 Formosans without legal process and for purely political purposes.

It is clear from Dr. Wu's statement that instances of brutal treatment of political critics by the secret police in Formosa are not the exception but the rule. His own son, Wu Hsiu-Huang, was held as a political hostage for more than a year on Formosa and was finally released only because of unfavorable world opinion. At page 15 of his statement Dr. Wu de-

scribes an incident which is of special significance because of its similarity to the instant cases. A pilot deserted from the Chinese Nationalist Air Force in 1951 because of dissatisfaction with the Government. Seeking political asylum in Okinawa and volunteering to join the United States Air Force in order to effectively fight Communism, he was returned to Formosa and executed by the Formosan Government.

The only rational conclusion that can be drawn from the evidence of record is that the government of Formosa is a dictatorship, and as such, it is committed to silencing its critics by the use of persecution. This conclusion leads inevitably to the further conclusion that appellants herein have a rational basis for fearing persecution by the government of Formosa on account of their political opinions. The record adequately reveals their political opposition to the government of Formosa.

It should be pointed out that no confidential information or extra record facts were considered in arriving at appellees' decisions in these cases. This was made clear in respondent's reply brief submitted in the Court below on May 10, 1957, wherein it is stated at page 2 as follows:

> "The petitioner's Reply Brief quotes from the record of proceedings, page 22, regarding an understanding by counsel that only the evidence of record will be considered in reaching 'your decision' (speaking to the examining officer). The Respondent has ascertained that no confidential information was made use of in arriving at the decision, and the entire record has been submitted."

As discussed above, Section 6 of the Act vests no discretionary power in the Attorney General. Therefore, the findings of appellees do not involve the exercise of discretion. Considering the whole record as it relates to persecution or fear of persecution in Formosa, it is submitted that the findings of the appellees are "unsupported by substantial evidence" and are "arbitrary" and "capricious" within the meaning of Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009, (e)).[13] Even prior to enactment of the Administrative Procedure Act, this court has on occasion set aside the findings of the Immigration Service on the ground that they were "purely arbitrary".

Gung You v. Nagle, 34 F. 2d 848 (C.C.A. 9, 1929).

It is significant that the District Court made no mention of persecution in its consolidated opinion denying relief to appellants. Evidently, the District Court did not consider making a finding on this subject until counsel for appellants asked if such a finding would be made at the hearing on modification of findings of fact. The following conversation then took place:

> "The Court. No, I am not making any finding on that at all. I would be ruling in a vacuum if I did that. I have no means of knowing. We have some letters, which are not very persuasive, from the Chinese Consul, that they would be

[13]See *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 487, 488 (1950).

given a fair trial and possibly a three-year sentence.

Mr. Hargreaves. We are faced with one more problem, then, your Honor. If your Honor is not prepared to rule on that issue—of course, he does not need to establish actual persecution, but only fear of persecution, under the statute—I think there is no question about it; he certainly has fear of prosecution——

The Court. He has a reasonable fear of being prosecuted for desertion, even though it may be a technical desertion. He has to face trial.

Mr. Hargreaves. That is not the fear which he has. I mean because of the political——(15)

The Court. What you mean to say is that he has a reasonable fear that he is going to be persecuted because of his political antipathy toward Chiang Kai Shek.

Mr. Hargreaves. That is correct, your Honor, and because of his actual actions against him. And, of course, if you uphold the government's finding that his last official residence was Formosa, then there is still the question, well, if he has established a reasonable fear of return to Formosa, he is still eligible for relief under the Refugee Relief Act.

Mr. Grant. Your Honor, I hope I did not mislead you. There is a conclusion in here that the petitioner is not eligible for consideration under Section 6, since he can return to his place of residence, Taiwan, Formosa, without fear of persecution on account of race——

The Court. Oh, yes, that is in there. I remember that. All I have that is tangible to go on is the letter of the Chinese Consul.

Mr. Hargreaves. In opposition to that there is, of course, not only the man's own testimony, but there is Wu, a former governor, and there is the former testimony of two former Army officers. There is a great deal of direct evidence in there as to the conditions that existed in Formosa, and it would not be a prosecution for the crime of desertion, but punishment or death because of his political opposition.

The Court. If I were to hold that he has a (16) reasonable fear of persecution because of his political beliefs, then I would have to hold that he is eligible for relief under the Refugee Act, and I cannot hold that. I simply cannot, in logic, in reason, hold that, in view of the evidence taken administratively which has been before me.

Mr. Hargreaves. If he has a reasonable fear, then he is eligible. At least it should be sent to Congress and let Congress decide it.

Mr. Grant. There must be a distinction between whether he has a fear and whether his fear is objectively valid. He may have that fear, but we have no concrete evidence.

The Court. As a man I can appreciate his apprehension about going back there, but, as Mr. Grant has pointed out, objectively I have no evidence upon which to predicate that. That is a complete answer. In fact, there is some evidence to the contrary. Frankly, as a man, I would not believe it.

Well, there is nothing I can do but sign the judgment that is submitted, and the findings. . . ." (T., vol. II, 45-47.)

It is believed that the Distict Court in making its findings pertaining to persecution in these cases, relied upon an erroneous standard of proof. In agreeing with Mr. Grant's statement that, "he may have that fear but we have no *concrete evidence",* the Court was concerned with the fact that ". . . *objectively* I have no evidence upon which to predicate that." Neither the statute nor the regulations suggest that any special type of evidence or that any higher quantum of proof need be offered by an applicant under Section 6 to establish persecution or fear of persecution. Undoubtedly, the trier of the facts may experience some difficulty in ascertaining whether an applicant fears persecution, inasmuch as the determination of this fact rests in some degree upon the applicant's subjective attitude. But whether the finding concerns "fear of persecution" or such an objective matter as "physically present in the United States on the date of the enactment of this Act," the quantum of proof and the type of evidence is the same. In neither case does the statute require *concrete* evidence or *objective* evidence. We believe that both the District Court and the appellees have erred in requiring a different type of evidence and imposing a higher quantum of proof upon appellants than is authorized by the statute.

It is submitted that the evidence of record allows but one reasonable conclusion, and that is, that the appellants have a rational basis for fearing persecution upon their return to Formosa on account of their political opinions.

III. DEPORTABILITY.

The District Court's second conclusion of law in both cases is that:

> "Upon the termination of his status as a bona fide non-immigrant within the meaning of Section 6 of the Refugee Relief Act, petitioner became ineligible for the benefits of that Act." (T., Cheng, 22; T., Lin, 22.)

This conclusion is in accordance with the consolidated opinion of the District Court which states:

> "Upon the well reasoned authority to be found in *Wei v. Robinson,* a case decided by the United States Court of Appeals, Seventh Circuit, June 28, 1957 (246 F. 2d 739) the relief sought by the petitioners, and each of them, is hereby denied." (T., Cheng 16; T., Lin 16.)

The only similarity between the *Wei* case, relied upon by the District Court, and the instant case is that Wei, like the appellants herein, was a member of the Chinese Nationalist Armed Forces and entered the United States for training purposes. The sole issue in the *Wei* case was whether an alien admitted to the United States prior to the effective date of the Immigration and Nationality Act of 1952, who fails to maintain his non-immigrant status, is subject to deportation under the provisions of Section 241(a)(9) of the Immigration and Nationality Act of 1952. While the Court's opinion in the *Wei* case indicates that Wei had filed an application under Section 6 of the Refugee Relief Act, his eligibility for the benefits of Section 6 was not determined or even discussed by the Court.

The only reference to the term "bona fide non-immigrant", appearing in Section 6 is in connection with an applicant's entry into the United States. The statute expressly provides that the applicant must have, ". . . lawfully entered the United States as a bona fide nonimmigrant. . . ." No language can be found within Section 6 which even suggests that an applicant must maintain his non-immigrant status subsequent to his entry in order to be eligible for relief. Nothing in the legislative history of the Act supports the conclusion that Congress intended to preclude relief from aliens found deportable for failure to maintain their non-immigrant status in the United States. Undoubtedly, Congress realized that the majority of applicants would be aliens who had violated their non-immigrant status because they had had to remain in the United States longer than originally planned. For this reason, the only requirement exacted by the statute is that the applicant, "lawfully entered the United States as a bona fide nonimmigrant."

At no time have the Immigration authorities suggested that the appellants were ineligible for relief under Section 6 because they were subject to deportation for failure to maintain their status as bona fide non-immigrants. Appellants have conceded that they were deportable throughout the administrative proceedings. By filing their actions in the District Court they had no intention of raising any issue with respect to the validity of the deportation orders or the regularity of the deportation proceedings. These actions

were limited to seeking review of the final administrative orders finding them ineligible for the benefits of Section 6. However, the consolidated opinion of the District Court would indicate that the sole issue involved in these cases was whether the final orders of deportation relating to appellants were valid, an issue which, in fact, was not before the Court.

Finding no lack of procedural due process and that the deportation orders were valid, the District Court felt impelled to deny the relief sought by appellants, although the hope was expressed that his judgments would be reversed by the Court of Appeals. (T., 2, 47-48.) That the District Court believed that relief was foreclosed to appellants because they had been accorded procedural due process and the final orders of deportation were valid is borne out by reading as a whole the reporter's transcript of the Hearing on Modification of Findings. (T. 2, 33 *et seq.*) We respectfully submit that the District Court erred in basing the judgments in these cases upon appellants' termination of status as bona fide non-immigrants.

CONCLUSION.

For the reasons set forth above, we submit that the judgments below should be reversed.

Dated, San Francisco, California,
March 20, 1959.

Respectfully submitted,
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Attorneys for Appellants.